BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal Of: ROBERT GROSSMAN, Appellant, -against- CITY OF MERCER ISLAND, Respondent.	No. APL25-004 **APPELLANT'S MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, CLARIFICATION**

PRELIMINARY STATEMENT

The Hearing Examiner's July 3 order (the "July 3 Order") granting the Motion for Summary Judgment of Applicant Seascape Homes LLC ("Seascape") should be reconsidered.

First, the July 3 Order is based on erroneous facts concerning the sequence of events underlying Appellant's appeal. The pivotal conclusion of the July 3 Order is that: "Grossman cannot now collaterally attack that Tree Permit by filing an appeal from a CAR 2 decision." This has the order of events backwards. ***There was no tree permit in existence on the date Appellant filed his CAR 2 Decision appeal***. The CAR 2 Decision was issued on April 14, and Appellant filed his appeal on April 28, the last day on which he could have timely filed. The tree permit was not issued until two days later, on April 30 (the building permit was also issued on April 30). Thus, as of the deadline for Appellant to appeal the CAR 2 Decision, Appellant had no

knowledge of whether or when a tree permit would be issued, and the filing of his appeal could not have been a "collateral attack" on a tree permit that did not yet exist.

Second, the July 3 Order was based on an additional erroneous fact: that the CAR 2 Decision did not authorize the removal of trees 1003 and 1004. Notably, the July 3 Order failed to consider Seascape's CAR 2 application cover letter, which explicitly requested the City's approval to remove trees 1003 and 1004. This request was supported by the inclusion in Seascape's CAR 2 application of a tree replacement plan depicting the removal of trees 1003 and 1004 and their replacement. Following Respondent's review of the CAR 2 application, it issued the CAR 2 Decision, which approved the removal of trees 1003 and 1004 conditioned on the planting of replacement trees. Consideration of this evidence at a minimum would have created an issue of fact as to whether the CAR 2 Decision erred in violating multiple provisions of MICC 19.07 that should have protected these trees.

Third, the July 3 Order failed to comply with applicable regulations. The July 3 Order cites no provision of the MICC or prior precedent for its holding that tree removal cannot be authorized by a tree permit, building permit, ***and*** a CAR 2 decision, and that of the aforementioned approvals, the only one that can be challenged by Appellant is the tree permit. To the contrary, under the MICC, tree removal at a development site involving a critical area is relevant to all of those approvals, and Appellant properly exercised his right to appeal the CAR 2 Decision, a Decision which failed to comply with MICC 19.07 as that section pertains to tree removal.

Fourth, the July 3 Order suffered from a procedural error in that it relied on Respondent's Response to Seascape's Motion for Summary Judgment ("Respondent's MSJ"). While nominally titled a "Response" to Seascape's motion, Respondent's MSJ advanced

numerous new arguments not contained in Seascape's motion, in effect constituting an independent motion for summary judgment. Appellant should have been afforded an opportunity to respond to these arguments. Instead, the July 3 Order—which adopted some of the new arguments advanced only for the first time in Respondent's MSJ[1]—was issued less than two hours after receiving Respondent's MSJ.

Finally, if the Examiner declines to reconsider its July 3 Order, Appellant respectfully requests that the Examiner clarify that although he is dismissing Appellant's appeal, the July 3 Order does not hold that the issuance of tree permit on a site involving a critical area prevents any challenge to that tree removal as part of the critical area review. This clarification is important because, in its absence, trees will lose the significant additional protections afforded to them as part of a critical area Type III Land Use Review.

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[1] For example, the contention that Appellant's appeal fails because trees 1003 and 1004 are not within the critical area was only first put forward in Respondent's MSJ. Appellant should have had the opportunity to respond to the argument before it was adopted in the July 3 Order a mere two hours later. *See* July 3 Order at p. 3. Among other flaws, this argument failed to consider that one important function of the critical area review is to consider the impact on a critical area of the development proposal, without any limitation on whether the entire development proposal falls within the critical area. *See* MICC 19.07.110(B) (describing the obligation to ensure that the critical area study included "[a]n assessment of the probable effects to critical areas and associated buffers, including impacts caused by the development proposal . . . .").

STATEMENT OF FACTS

A. Seascape Requested the Removal of Trees 1003 and 1004 in Each of Its CAR 2, Building Permit, and Tree Permit Applications

Seascape explicitly requested authorization to remove trees 1003 and 1004 as part of its CAR 2 application. Specifically, the application narrative submitted by Seascape along with its CAR 2 application form—which was not cited in the July 3 Order—states that:

> "[R]emoval of two additional trees at the southern edge of this lot is also being proposed – a 33.5" Douglas fir and a 19.2" Douglas fir [(i.e., trees 1003 and 1004)]. These trees are ***being requested*** for removal due to their limitation on the ability to achieve 85% of the GFA allowed for this lot."

See Spence Decl. Exh. C at PDF p. 15 (emphasis added).[2]

Seascape also requested authorization to remove trees 1003 and 1004 as part of its building permit application. Specifically, a letter Seascape submitted "as part of an application for a building permit"—notably, not a tree permit—"request[ed] the removal of regulated tree 1003 and exceptional tree 1004. *See* Spence Decl Exh. E at PDF pp. 20-21 (letter with subject "Explanation and Justification for removal of exceptional trees").

It is undisputed that Seascape's tree permit application also sought authorization to remove trees 1003 and 1004. *See* Spence Decl. Exh. G.

B. The CAR 2 Decision Authorized the Removal and Replacement of Trees 1003 and 1004

The CAR 2 Decision explains that proposed development satisfies the mitigation obligations under MICC 19.07 in part because it includes "the planting of replacement trees."

[2] "Spence Decl." refers to the Declaration of Michael A. Spence in Support of Applicant Seascape Homes, LLC's Motion for Summary Judgment, dated June 20, 2025.

See July 9 Order Exh. 9001.1, PDF p. 6. The CAR 2 Decision concludes by asserting that the CAR 2 application—which as stated above explicitly requested removal of trees 1003 and 1004—"as depicted in Exhibit 8, is hereby APPROVED as conditioned." *See* July 9 Order Exh. 9001.1, PDF p. 10. One of the CAR 2 Decision's explicit conditions of approval was that the proposed development be "in substantial conformance with . . . all applicable development standards contained within Chapter 19.07 of the Mercer Island City Code." *Id.* Further, the "Exhibit 8" approved by the CAR 2 Decision included a "Replacement Tree Plan" and a landscape plan, which depicted the removal of trees 1003 and 1004 and their replacement. *See id*. at PDF pps. 106, 139.

C. The Deadline for Appealing the CAR 2 Decision Passed Before the Building Permit and Tree Permit were Issued

The CAR 2 Decision was issued on April 14, and accordingly, the deadline to appeal was April 28. *See* MICC 19.15.130(b). Appellant filed his appeal on the April 28 deadline. The relevant building and tree permits were issued two days later, on April 30. *See* Spence Decl. Exhs. B and G.

ARGUMENT

I

THE JULY 3 ORDER SHOULD BE REONSIDERED BECAUSE IT ERRONEOUSLY CONCLUDED THAT THE ISSUANCE OF A TREE PERMIT EXEMPTED THE REMOVAL OF TREES 1003 AND 1004 FROM THE SCOPE OF THE CAR 2 DECISION

The critical portion of the July 3 Order concludes:

> "Both permits (most important to this appeal, the Tree Permit) have been issued, neither permit was appealed, and the time period within which one could have appealed either or both has passed. Simply put, CP&D issued a Tree Permit for removal of the trees whose removal Grossman is now objecting to through this appeal. That Tree Permit was subject to a right of appeal. Grossman did not appeal that Tree Permit for whatever reason. Grossman cannot now collaterally attack that Tree Permit by filing an appeal from a CAR 2 decision. The merits of either or both of the Tree and Building Permits cannot be argued through this appeal."

July 3 Order at p. 5. Implicit in this holding is the unremarkable and accurate conclusion that the removal of trees 1003 and 1004 could be requested and authorized in multiple approvals by Respondent – *i.e.,* the building and tree permits. However, it is also true that Seascape requested and received approval to remove trees 1003 and 1004 in its CAR 2 Decision. *See* Statement of Facts, Sections A-B, *supra*.[3] Appellant had a statutory right to appeal that decision (*see* MICC 19.15.130) and he did so, not in an effort to "collaterally attack" the tree permit, which had yet to be issued, but because the CAR 2 Decision plainly violated the MICC. The following sections explain why Appellant's appeal was proper.

A. Seascape Requested, and Respondent Authorized, Removal of Trees 1003 and 1004 as Part of the Critical Area Review

As set forth above, Seascape explicitly requested removal of these trees in its CAR 2 application cover letter and application, and the CAR 2 Decision authorized their removal and replacement (notably, the July 3 Order did not consider or address the specific request to remove these trees in Seascape's CAR 2 application cover letter[4]). *See* Statement of Facts, Sections A-B, *supra.*

B. Appellant's Appeal of the CAR 2 Decision was Not a Collateral Attack on the Tree Permit

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[3] Notwithstanding the evidence that the parties understood that the CAR 2 application sought, and the CAR 2 Decision authorized, the removal and replacement of trees 1003 and 1004, it's conceivable that Seascape and Respondent would at some point contend these documents don't actually mean what they say. However, such arguments would merely raise material facts that should properly be determined at a hearing. There is no basis on the evidence presented to grant summary judgment in Seascape or Respondent's favor.

[4] *See* Spence Decl. Exh. C at PDF p. 15.

Although the July 3 Order did not make any finding about whether the CAR 2 Decision authorized the removal of Trees 1003 and 1004, it nevertheless concluded that Appellant could only have appealed the tree permit (and not the CAR 2 Decision, or the building permit), and that an appeal of the CAR 2 Decision was an improper "collateral attack" on the tree permit. This was not correct because the tree permit had not been issued at the time Appellant filed his appeal.

Moreover, it is irrelevant that Seascape requested removal of these trees within multiple permit applications. Seascape could not avoid review of the removal of trees 1003 and 1004 in its CAR 2 application simply by also seeking a tree permit. If it were able to do so, developers could effectively avoid subjecting tree removals to the protections afforded by Type III Land Use Reviews. *See* Argument, Section II, *infra*. And Appellant was entitled to appeal from any administrative decision on the basis that there was a substantial error in that decision. *See* MICC 19.15.130(B)-(C). In other words, if Appellant can prove that there was a substantial error in the CAR 2 Decision, he should prevail, regardless of whether a tree permit was issued, or whether Respondent would have preferred that he appeal a different administrative decision instead of the CAR 2 Decision.

C. The July 3 Order Failed to Comply with Applicable Regulations that Allowed Appellant to Appeal the CAR 2 Decision on the Basis that Substantially Erred in Authorizing the Removal of Trees 1003 and 1004

It is telling that the July 3 Order cites no MICC provision or precedent as support for its holding that the issuance of a tree permit authorizing removal exempts such removal from review in connection with any other permit or approval. Respectfully, the reason that the July 3 Order can cite no MICC provision or precedent in support of its holding is that the MICC is directly contrary. For example, despite the existence of MICC 19.10 governing tree removal, MICC 19.07 also includes its own independent prohibition on "the removal of large or exceptional trees." *See* MICC 19.07.120(E)(4)(f). Notably, compliance with this provision is exempt from

city review and approval ***only*** to the extent the compliance is "otherwise consistent with the provisions of other city, state, and federal laws and requirements." *See* MICC 19.07.120(A). Where, as here, the proposed removal of trees would violate another city requirement such as MICC 19.10.060(A)(3), the exemption does not apply and Respondent was required to complete its critical area review in compliance with 19.07.120(E)(4)(f). This failure of the CAR 2 Decision to comply with MICC 19.07 was a substantial error within the scope of its critical area review.

Further, rather than stating that critical area reviews should not consider any regulations outside of MICC 19.07 (as the July 3 Order suggests), that chapter is clear that the opposite is true: "[i]f more than one regulation applies to a given property, then the regulation that provides the greatest protection to critical areas shall apply." *See* MICC 19.07.030(A) ("Relationship to other regulations" provision). Because the CAR 2 Decision failed to consider whether the CAR 2 application complied with other MICC provisions intended to protect the site (including 19.10.060(A)(3)), it clearly violated MICC 19.07.030(A), which, again, was a substantial error within the scope of its critical area review.

Similarly, if the July 3 Order was correct—and developers could avoid reviewing tree removal during critical area reviews simply by securing a tree permit—it's difficult to see how Respondent could comply with numerous other requirements of MICC 19.07. *See, e.g.,* MICC 19.07.0160(B)(2) (describing the obligation for critical area documents to consider "landscaping of all disturbed areas outside of building footprints…"); MICC 19.07.110(B) (describing the obligation to ensure that the critical area study included "[a]n assessment of the probable effects to critical areas and associated buffers, including impacts caused by the development proposal . . . ."); MICC 19.07.010(B) (making clear that a purpose of the CAR 2 regulations is to "to

maintain the functions and values of critical areas and enhance the quality of habitat to support the sustenance of native plants and animals"). [5]

Simply put, the MICC could not be clearer that Respondent's critical area review needed to evaluate tree removal in the context of 19.07 (which in turn required consideration of other MICC provisions, such as MICC 19.10). This is undoubtedly why Seascape explicitly requested authorization to remove Trees 1003 and 1004 in its CAR 2 application cover letter, why Seascape's CAR 2 application contained a tree replacement plan depicting the removal of trees 1003 and 1004 and their replacement trees, and why the CAR 2 Decision included the tree replacement plan and conditioned approval on the proposed tree replacement and that the proposed development be "in substantial conformance with . . . all applicable development standards contained within Chapter 19.07 of the Mercer Island City Code." *See* July 9 Order Exh. 9001.1, PDF p. 10.[6]

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[5] Put another way, and to use an extreme but illustrative example, had Respondent erroneously issued a building permit for a skyscraper on this site, it's not the case that the CAR 2 Decision would be insulated from an appeal maintaining that Respondent had made a substantial error in determining that a skyscraper was compliant with the MICC and posed no danger to the critical area.

[6] Respectfully, should the Examiner disagree with the arguments presented in this section and believe that the CAR 2 Decision complies with the provisions of MICC 19.07 cited herein, Appellant respectfully requests that the Examiner explain why in its order denying Appellant's Motion for Reconsideration. An explanation will help the parties properly frame their arguments in a judicial appeal.

II

IF THE HEARING EXAMINER WILL NOT RECONSIDER THE JULY 3 ORDER, APPELLANT RESPECTFULLY REQUESTS THAT THE EXAMINER CLARIFY THAT THE ORDER DOES NOT HOLD THAT TREE REMOVAL CANNOT BE CHALLENGED IN A CAR 2 DECISION WHERE A TREE PERMIT AUTHORIZING REMOVAL HAS BEEN ISSUED OR MAY BE ISSUED IN THE FUTURE

Appellant filed its appeal in this action with the modest goal of saving two 100+ year old Douglas firs. It would be a bitter pill to swallow if Appellant not only failed in that, but also established a precedent that would effectively strip away the procedural protections afforded to all tree removals that occur in a development subject to a critical area review.

Type III Land Use Reviews are afforded several procedural protections and opportunities for public involvement that do not exist in Type I Land Use Reviews. For example, while Type III CAR 2 Reviews require a pre-application meeting, notice of application, and notice of decision, a Type I tree permit review requires none of those measures. *See* MICC 19.15.030. Thus, the July 3 Order has the effect of allowing a developer to obtain a tree permit for the purposes of collaterally estopping any challenges to the tree removal in a critical area review (even where, as here, the tree permit is obtained after the CAR 2 appeal is filed). The benefits to a developer from this strategy would be procedural (e.g., avoiding scrutiny from pesky neighbors like Appellant) and substantive (e.g., insulating review of the tree removal from the larger context of the other actions the developer is taking that would impact the critical area). As established above, MICC 19.07 cares very much about trees and the protections extended to trees within a Type III CAR 2 review were undoubtedly intentional. It could not have been the MICC's intention that trees can never be considered as part of a critical area review in a case in which a separate tree permit has been issued, and at a minimum, the July 3 Order should be clarified to avoid setting that dangerous precedent.

CONCLUSION

For the reasons set forth above, the July 3 Order should be reconsidered, or in the alternative, clarified.

Respectfully submitted,

/s/ Robert Grossman
Robert Grossman

Date: July 8, 2025